IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	
	)	No. 55539-1-I
Respondent,	)	
	)	
v.	)	
	)	UNPUBLISHED OPINION
ROBERT ADAMS,	)	
	)	
Appellant.	)	
_____	)	FILED: **September 11, 2006**

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SCHINDLER, A.C.J. – A jury convicted Robert Adams of two counts of first-degree rape of a child. The victim was Adams's five-year-old nephew, J.W. Adams contends admission of J.W.'s hearsay statements to his mother, to a child interview specialist, and to his grandmother violated his constitutional right to confrontation because J.W. did not adequately describe the sexual acts or hearsay statements when he testified. Adams also challenges the trial court's decision to permit the jury to view the DVD exhibit of J.W.'s interview with the child interview specialist during deliberations and argues he was denied a fair trial based on prosecutorial misconduct

and ineffective assistance of counsel. In addition, Adams contends that the court's decision to impose a persistent offender sentence violates his Sixth Amendment right to a jury under Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

We conclude J.W.'s testimony satisfied the constitutional requirements for the Confrontation Clause and the trial court did not err in admitting J. W.'s hearsay statements. We also conclude the trial court's decision to allow the jury to view the DVD exhibit during deliberations was not an abuse of discretion, Adams cannot establish prosecutorial misconduct or ineffective assistance of counsel, and the court's decision to sentence Adams as a persistent offender did not violate his constitutional right to a jury trial under Apprendi and Blakely. We affirm Adams's conviction and the judgment and sentence.

FACTS

J.W. was born in February 1998. J.W. and his parents, Keri and Jason Welcome, live in a house in Tukwila on a lot owned by Keri's parents, Carolyn and Daryl Chase. Carolyn and Daryl Chase live in a mobile home on the same lot. In December 2000, Keri's sister, Lynette, and Lynette's husband, Robert Adams, moved into the small trailer located next to Carolyn and Daryl's mobile home. Because Adams did not have a regular job, he worked around the property and in the yard. J.W. and

Adams developed a very close relationship and spent a lot of time playing together.

When J.W.'s grandmother, Carolyn Chase, retired from her teaching job in June 2002, she started taking care of him while his parents were at work. J.W. spent time with Adams when he was at his grandmother's home.

In May 2003, five-year-old J.W. was playing with his three-year-old cousin, K.C. in the playhouse outside at his grandmother's home. When K.C.'s mother, Patrina Chase, checked on the boys, she saw K.C. with his underwear and pants down. Patrina asked the boys what they were doing. J.W. said, "nothing, nothing, nothing." But K.C. said that he and J.W. licked each other's penises. Patrina later told J.W.'s parents what happened.[1]

After learning about the incident, J.W.'s mother, Keri, talked to J.W. about his private parts and inappropriate touching. Keri asked J.W. if anyone touched him or "licked his penis." J.W. initially said no. Keri then named different people and asked more specifically if anyone had touched his private parts. J.W. quickly responded "no" to all the names except when Keri said Adams's name. When Keri said Adams's name, J.W. lowered his head and did not answer. After Keri reassured J.W. that he wasn't going to get into trouble, J.W. told his mother "that he saw [Adams] and he did the motion as if masturbating . . . and then he said he went to the bathroom." Keri thanked J.W. for telling her and ended the conversation.

[1] Patrina testified that K.C. and J.W. had engaged in sexual conduct approximately a year before while they were at their grandmother's house. Keri also testified about the earlier incident but thought it had happened about six months earlier.

Based on J.W.'s description, Keri wasn't sure what had happened and thought perhaps J.W. inadvertently saw Adams masturbating. Keri was reluctant to call the police because she didn't want Adams to be accused of something he didn't do. Instead, Keri called the King County Sexual Assault Center (KCSAC). The KCSAC made an appointment for J.W. to see a therapist in a couple of weeks and told Keri not to talk with J.W. about what had happened in the meantime. But, before the KCSAC appointment, Keri decided to ask J.W. a couple of questions to find out if what J.W. saw was inadvertent. Keri asked J.W. where he saw Adams touching himself. J.W. told her it was in a bedroom at his grandmother's house where his great-grandmother Jesse used to stay.[2] Keri then asked J.W. whether Adams knew J.W. was present in the room. J.W. responded yes, and said Adam put "his finger up [J.W.'s] rear end when he was playing with himself." J.W. told Keri Adams "peed and afterwards he got up and he washed his hands and he said he gave him candy after that." Keri said J.W. "was really worried that [Adams] was going to be upset with him for telling" her. Keri called KCSAC about the disclosures. Keri asked if she should wait for the appointment or call the police. KCSAC told Keri to call the police immediately, which she did.

On June 12, 2003, Ashley Wilske, a child interview specialist with the King County Prosecutor's Office, interviewed J.W. Wilske told J.W. that the interview was being videotaped and began the interview by talking about truth, reality, and pretend.

[2] J.W.'s great-grandmother, Jesse had died about six months before, and Keri knew Adams often stayed in her room.

Wilske then asked J.W. several questions about what happened with Adams. J.W. told Wilske "he uh [sic] pulled down his pants, and then, and then, he pulled his pants up, and then he took a bathroom and then he piss on himself, and then he took a bathroom and then he stuck his finger right up my butt."[3] J.W. said that Adams stuck his finger in his butt only one time when they were at his grandmother's house, and it felt "[r]eally harmful."[4] J.W. also said that on other occasions, Adams pissed on himself when he was "messing with his weenie"[5] and had also messed with J.W.'s "weenie." J.W. showed Wilske what he meant by moving his hand in an up and down motion. When Wilske asked J.W. if there was anything else he thought she should know, J.W. said, "Uncle Robert sucked my weenie."[6] J.W. told Wilske this happened more than one time, and that he sucked Adams's weenie. J.W. said this all happened at his grandmother's house when he was four and five-years-old, and that Adams gave him candy every time. When Wilske asked if anyone else had messed with his weenie, J.W. told her that a six-year-old girl and his cousin K.C. had also messed with his weenie.

At some point after the interview with Wilske, J.W. spoke to his grandmother for the first time about what happened with Adams. J.W. began the conversation by

[3] Exhibit (Ex.) 4.

[4] Ex. 4.

[5] Ex. 4.

[6] Ex. 4.

asking, "Grandma, would you be mad at me if I told you the truth about [Adams]." J.W.'s grandmother told him no but said, "I would be mad at you if you ever told me a lie especially about that." J.W. then told his grandmother that Adams "put his finger up my butt." His grandmother asked where it happened, and J.W. said in his great-grandmother's old room and that it really hurt. His grandmother asked where she was when it happened, and J.W. said she "was out in the garden."

On August 8, 2004, the State charged Adams with two counts of first-degree rape of a child in violation of RCW 9A.44.073. Before trial, the court held a hearing to determine whether J.W. was competent to testify and whether the hearsay statements J.W. made to his mother, Wilske, and his grandmother were admissible under the child hearsay statute. The court ruled J.W. was competent to testify and, after a careful analysis of the Ryan[7] factors, the court ruled J.W.'s hearsay statements were admissible.

At trial, J.W.'s mother, Wilske and J.W.'s grandmother each testified about J.W.'s hearsay statements and the court admitted the DVD of Wilske's interview with J.W. into evidence. Six-year-old J.W. also testified. J.W. said that he knew what it meant to tell the truth, accurately described his school, his family, and where he lived in proximity to his grandmother and Adams. J.W. said he knew Adams and they used to play together. When asked if he was related to Adams, J.W. stated, "Yeah, but not

[7] State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984).

anymore." The prosecutor then asked if J.W. liked Adams, and he said, "[v]ery much but not anymore." The prosecutor asked J.W. questions about whether Adams sexually abused him:

> Q Do you know what the private parts of your body are?
> A Yeah.
> Q Where are the private parts of your body?
> A Uh, down below.
> Q . . . . Can you point to the private parts of your body for us?
> A (Gesturing.)
> Q Are you pointing to where your pants are?
> . . . .
> A Yes.
> . . . .
>
> Q Has anybody ever touched you on the private part of your body, [J.W.]?
> . . . .
> A Yes.
> Q Whose touched you on the private part of your body?
> . . . .
> A Robert.
> Q When did Robert touch your private body parts?
> A Uh, it's been a long time and I forget.
> Q Did he touch you one time or more than one time?
> A One time.
> Q Can you tell us about the first time?
> A Uh, I forget.
> . . . .
> Q When you were in Grandma Jesse's bedroom with Robert did you ever see Robert do anything that made you uncomfortable?
> A Yes.
> Q Can you tell us about that?
> A I think so. I know some of it. I don't know—and I don't know alot.
> Q Can you tell us what you do know?
> A Of what?
> Q What did you see Robert doing?
> A I forget that part and forgot that part and that part and that part.
> . . . .

Q Did you ever see Robert's private body part?
A Yeah.
Q What was he doing when you saw his private body part?
A Uh, I forget I think. I take that a no.
. . . .
Q How come you don't like Robert anymore?
A Because what he did to me.
Q What did he do to you?
. . . .
A Uh, I forget.
Q Is this hard for you to talk about?
A Yes, and I'm telling the truth and I don't know.
. . . .

The prosecutor then asked J.W. about the hearsay statements he made his mother, grandmother, and Wilske:

Q Do you remember telling other people what Robert did to you?
A No, only my mom some of it.
Q When did you talk to your mom?
A Uh, I don't know.
. . . .
Q Do you remember talking to a lady named Ashley?
A Yeah.
Q What did you talk to Ashley about?
A About colors, a little bit about Robert.
. . . .
Q Did you tell Ashley the truth when you talked to her about Robert?
A I think, yeah.
Q When you talked to your mom about Robert did you tell your mom the truth?
A I think -- yeah.
Q Do you remember talking to those two lawyers right there one day? Those two lawyers that are sitting beside Robert?
A Yeah.
Q Did you tell them the truth about what Robert did?
A Uh-huh.
Q Do you want to tell us now what Robert did?
A Uh, I still forget.

After J.W. testified, Adams's attorney moved for a mistrial. Adams's attorney argued J.W. did not testify about the alleged sexual acts, and therefore the child hearsay testimony was not admissible. The trial court denied the motion for a mistrial. The court ruled J.W. testified about the sexual contact with Adams and concluded admission of J.W.'s hearsay statements did not violate the Confrontation Clause.

During jury deliberations, the jury asked the court for video equipment to play the DVD exhibit admitted into evidence of Wilske's interview with J.W. In response to the request, the court allowed the jury to view the DVD by playing it one time straight through in the courtroom. The jury found Adams guilty as charged.

At sentencing, the State requested the court impose a life sentence with no possibility of parole under the persistent offender statute, and presented evidence of Adams's prior Washington convictions for second-degree assault and first-degree robbery.[8] Adams requested a standard range sentence of 240 to 318 months based on an offender score that included his prior convictions for second-degree assault and first-degree robbery. The court concluded Adams was a persistent offender and imposed a life sentence with no possibility of parole.[9] Adams appeals.

ANALYSIS

Right to Confrontation

Adams contends his right to confrontation was violated when the trial court

[8] RCW 9.94A.030(32)(a)(i)-(ii).

[9] RCW 9.94A.570.

admitted J.W.'s prior out-of-court statements to his mother, Wilske, and his grandmother under the child hearsay statute, RCW 9A.44.120. Specifically, Adams argues that J.W. did not adequately testify about the sexual acts or the hearsay statements.[10] We review whether a defendant was unconstitutionally deprived of the right to confront his accuser de novo. State v. Medina, 112 Wn. App. 40, 48, 48 P.3d 1005 (2002).

A defendant has both a federal and state constitutional right to confrontation. The federal constitution guarantees a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. The Washington State Constitution provides that "[i]n criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face. . . ." U.S. Const. Art. I, § 22.

Child hearsay is conditionally admissible under RCW 9A.44.120 and does not violate a defendant's right to confrontation if the requirements of the child hearsay statute are met. RCW 9A.44.120 provides in relevant part:

> A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another . . . otherwise admissible by statute or court rule, is admissible in . . . criminal proceedings . . . if:
>
> (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
>
> (2) The child either:
>
> (a) Testifies at the proceedings; or
>
> (b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is

[10] Adams does not challenge the trial court's decision that J.W. was competent to testify or the court's application of the factors under Ryan, 103 Wn.2d 165.

corroborative evidence of the act.

A child's testimony is interpreted and analyzed under the requirements of the Confrontation Clause to determine whether the testimony meets the requirements of the child hearsay statute. State v. Rohrich, 132 Wn.2d 472, 476, 939 P.2d 697 (1997). The admission of child hearsay statements under RCW 9A.44.120 meets the requirements of the Confrontation Clause if the child "is a witness at trial, is asked about the event and the hearsay statement, and the defendant is provided an opportunity for full cross examination." State v. Clark, 139 Wn.2d 152, 159, 985 P.2d 377 (1999); see also State v. Montgomery, 95 Wn. App. 192, 199, 974 P.2d 904 (1999).

The Washington Supreme Court, in State v. Rohrich, 132 Wn.2d 472, 939 P.2d 697 (1997), held that a child does not testify for purposes of the child hearsay statute and the Confrontation Clause if the child does not describe the acts of sexual contact alleged in the hearsay. In Rohrich, the prosecutor called the child victim to testify but did not ask questions about the alleged sexual contact. Id. at 474. Instead, the prosecutor asked the child innocuous questions about her school and her birthday. Id. The Supreme Court concluded the testimony did not satisfy the Confrontation Clause because the child did not describe "the acts of sexual contact alleged in the hearsay." Id. at 482.

By contrast, the Court held in Clark that the requirements of the Confrontation Clause were met when the child recanted and denied the sexual abuse. Clark, 139 Wn.2d at 154. In deciding there was no Confrontation Clause violation, the Court relied on United States v. Owens, 484 U.S. 554, 560, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988) and California v. Green, 399 U.S. 149, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1980).

In Owens, a correctional counselor was assaulted by the defendant and suffered a severe head injury. Id. at 840. While in the hospital, the counselor was able to name and identify his attacker. Id. at 841. At trial, the counselor testified about the assault and that he remembered identifying the defendant as his attacker while in the hospital, but admitted that he could not remember seeing his attacker. Id. The Court held the Confrontation Clause does not bar admission of a prior out-of-court statement as long as the declarant is present at trial to defend or explain the statement, even if the witness claims he is not able to or cannot remember the prior testimonial statement. Id. at 558-60.

In Green, the Court addressed the situation where a recalcitrant witness at trial acknowledges his hearsay statement but claims not to recall the underlying facts implicating the defendant. The Court held the Confrontation Clause is not violated where the declarant testifies at trial and is subject to cross examination. Green, 399 U.S. at 158. "[I]f the witness admits the prior statement is his, or if there is other evidence to show the statement is his, the danger of faulty reproduction is negligible

and the jury can be confident that it has before it two conflicting statements by the same witness." Green, 399 U.S. at 158. See also In re Pers. Restraint of Grasso, 151 Wn.2d 1, 16-17, 84 P.3d 859 (2004) (concluding the child's testimony, "'I don't remember'" and "'I don't know'" is constitutionally sufficient but the response, "'I don't want to talk about it'" is not sufficient).[11]

Here, unlike Rohrich, the State did not impermissibly attempt to shield J.W. from answering difficult questions about the alleged abuse. The State asked J.W. about the abuse and J.W. testified that Adams touched his private body parts. J.W. identified Adams by pointing him at him, spelling, and then saying his name. J.W. also testified that he had seen Adams's private body parts. But when the State asked additional questions about the sexual abuse, J.W. said he could not remember when it happened. As explained, under Clark, Owens, and Green, J.W.'s testimony that he could not remember is a constitutionally acceptable response that does not violate the Confrontation Clause. And, even though Adams chose not to cross examine J.W., during closing argument Adams focused on J.W.'s lack of memory to argue he was not credible.

[11] See also State v. Price, 127 Wn. App. 193, 110 P.3d 1171 (2005) (finding child's testimony did not violate Confrontation Clause where State asked child whether the defendant had touched her anywhere and whether she remembered speaking with her mom and the detective about the defendant, to which the child responded, "'me forgot'"), rev. granted in part by 156 Wn.2d 1005 (2006); compare with In re Pers. Restraint of Grasso, 151 Wn.2d 1, 16-17, 84 P.3d 859 (2004) (finding some of child's testimony violated the Confrontation Clause where the State told her she could say "'I don't want to talk about it'") and Rohrich, 132 Wn.2d at 474 (finding child's testimony violated Confrontation Clause where the state asked only innocuous questions unrelated to the allegations and hearsay statements).

Adams also asserts he could not meaningfully cross examine J.W. about the hearsay statements because the State did not specifically refer to the rape allegations when questioning J.W. The State asked J.W., "[d]o you remember telling other people what Robert did to you?" J.W. testified that he remembered talking to his mother and Wilske about what Adams did to him and that he told the truth when he talked with them about Adams, but that he did not recall the details of the conversations. And, although J.W. said he did not remember talking with his grandmother about Adams, the context of the preceding questions show the State was attempting to confirm J.W.'s recollection of the child hearsay statements he made to his mother, Wilske, and his grandmother.

We conclude J.W.'s testimony about the alleged sexual contact and his hearsay statements to his mother, Wilske and his grandmother adequately meets the requirements of the child hearsay statute and the Confrontation Clause. The trial court did not err in admitting J.W.'s hearsay statements and in denying Adams's motion for mistrial.

Prosecutorial Misconduct

Adams contends the prosecutor committed misconduct by referring to hearsay statements in closing argument that the court had ruled were inadmissible. To prevail on a claim of prosecutorial misconduct, the defendant must show both improper

conduct and prejudicial effect. State v. Roberts, 142 Wn.2d 471, 533, 14 P.3d 713 (2000). Failure to object to an improper remark constitutes a waiver unless the remark is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

During the direct examination of Keri, the State asked her whether she talked to J.W. about Adams after the interview with Wilske. Without objection, Keri responded that she asked J.W. what he told Wilske, and J.W. disclosed additional information to her. The State then asked Keri, "What did he tell you he told [Wilske]?" Again, without objection, Keri answered, "I don't remember the exact order but he had said that Robert when he was masturbating had stuck his finger up his rear end and that his fingernail was sharp. And that he tried to afterwards stick his penis in his – and he called it his butt-- but he couldn't get the penis small enough to fit. He also said that that exchange --." At this point Adams interjected an objection on hearsay grounds, and the court sustained the objection.[12] In closing argument, the State referred to the disclosures made by J.W. to his mother after his interview with Wilske and Adams did not object.

Here, even if the State's reference to J.W.'s hearsay statements to his mother during closing argument was inappropriate, the reference was not so flagrant and ill-intentioned that it could not have been neutralized by an instruction to the jury.

[12] Adams did not move to strike Keri's testimony about J.W.'s disclosures.

Ineffective Assistance of Counsel

Adams also argues he received ineffective assistance of counsel because his lawyer failed to move for a mistrial or ask for a curative instruction when the court sustained an objection to inadmissible child hearsay evidence, and object when the prosecutor referred to inadmissible evidence during his closing argument. To establish ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. State v. Turner, 143 Wn.2d 715, 730, 23 P.3d 499 (2001). There is a strong presumption that counsel provided effective assistance. State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003). Deficient performance is shown if counsel's conduct fell below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997). To satisfy the prejudice prong, a defendant must show that counsel's deficient performance was so inadequate that there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); accord State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999). If the defendant fails to satisfy either part of the test, the inquiry goes no further. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Because admission of J.W.'s hearsay statements to his mother did not violate the child hearsay statute or Confrontation Clause, Adams cannot show his attorney's

performance was deficient in order to establish ineffective assistance of counsel.

Playing the DVD Exhibit During Jury Deliberations

Relying on State v. Koontz, 145 Wn.2d 650, 41 P.3d 475 (2002), Adams contends that the trial court erred in permitting the jury to view the DVD of Wilske's interview of J.W. during jury deliberations. CrR 6.15(e) provides that the jury shall take all exhibits received in evidence with it during deliberations. State v. Castellanos, 82 Wn. App. 204, 207, 916 P.2d 983 (1996). "A jury may have access to an audio tape exhibit during deliberations if, in the discretion of the court, the exhibit bears directly on the charge and is not unduly prejudicial." Id. at 205 (citing State v. Frazier, 99 Wn.2d 180, 189, 661 P.2d 126 (1983)). We review whether a trial court erred in giving an exhibit to the jury during deliberations for abuse of discretion. Frazier, 99 Wn.2d at 190-91. And, permitting the jury unrestricted access to an audio tape exhibit, alone, is not an abuse of discretion. Frazier, 99 Wn.2d at 190; Castellanos, 82 Wn. App. at 207.

In Koontz, the court addressed whether and under what circumstances a jury may review videotaped trial testimony during its deliberations. The Koontz court noted that replaying testimony is disfavored because of the danger of undue emphasis on the testimony and that video-taped testimony heightens this danger. Koontz, 145 Wn.2d at 654-55. The court suggested procedural precautions that a trial court should take when deciding whether or not to give video-taped testimony to a jury during deliberations:

> Protections to prevent undue emphasis in the manner of video replay may include replay in open court, court control over replay, and review by both counsel before presentation to the jury. Other protections may include the extent to which the jury is seeking to review facts, the proportion of testimony to be replayed in relation to the total amount of testimony presented, and the inclusion of elements extraneous to a witness' testimony. A determination to allow videotape replay should balance the need to provide relevant portions of testimony in order to answer a specific jury inquiry against the danger of allowing a witness to testify a second time. It is seldom proper to replay the entire testimony of a witness. These considerations are not exhaustive but should be evaluated before a videotape replay is presented to a deliberating jury.[13]

The Koontz court concluded the trial court abused its discretion by allowing the jury to view videotapes of trial testimony without sufficient precautions. Id. at 660.

Adams's reliance on Koontz is misplaced. Koontz is distinguishable because the court was addressing videotaped trial testimony. Id. at 658. And, the Koontz court specifically recognized recorded *trial testimony* should not be treated the same as *recorded exhibits*. Id. at 658-59. Here, we are addressing a properly admitted DVD *exhibit*. Furthermore, the trial court here took adequate precautions to avoid the danger of over-emphasis by prohibiting the jury from having free access to the DVD and by permitting them to review the DVD only once, straight through, and in the courtroom. The DVD bore directly on the charge and was not unduly prejudicial. The trial court did not abuse its discretion in permitting the jury to review the DVD exhibit.

[13] Koontz, 145 Wn.2d at 657.

Persistent Offender Sentence

Adams contends that the court's decision to impose a persistent offender sentence violates his Sixth Amendment right to a jury trial under Apprendi and Blakely.

The jury convicted Adams of two counts of rape in the first degree of his five-year-old nephew, J.W. The two first-degree child rape convictions are qualifying sex offenses under RCW 9.94A.712. Under RCW 9.94A.712, the court must impose a maximum term of life in prison. Adams's prior convictions of first-degree robbery and second-degree assault also qualify as offenses under the Persistent Offender Accountability Act. The trial court concluded that Adams is a persistent offender under RCW 9.94A.030(32)(a)(i)-(ii) and imposed a life sentence with no possibility of parole under RCW 9.94A.570.

Our court has repeatedly rejected Adams's argument that a prior conviction must be submitted to a jury and proved beyond a reasonable doubt. State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003) (holding neither the federal nor state constitutions require the fact of prior convictions be determined by jury); State v. Wheeler, 145 Wn.2d 116, 34 P.3d 799 (2001) (holding Apprendi does not require that prior convictions used to establish persistent offender status be submitted to a jury and proved beyond a reasonable doubt); State v. Ball, 127 Wn. App. 956, 113 P.3d 520 (2005) (holding Blakely does not apply to sentencing under the Persistent Offender Accountability Act); see also State v. Hughes, 154 Wn.2d 118, 137, 140, 142, 110 P.3d

192 (2005) (confirming the fact of prior convictions did not need to go to the jury, but holding the "clearly too lenient" determination for an exception sentence is a factual finding that must go to the jury). Adams's persistent offender sentence does not violate his Sixth Amendment right to a jury under Blakely and Apprendi.

CONCLUSION

We conclude admission of J.W.'s hearsay statements did not violate the requirements of the child hearsay statute of the Confrontation Clause. Adams has not shown prosecutorial misconduct or ineffective assistance of counsel, and the trial court did not abuse its discretion by permitting the jury to view the DVD exhibit of J.W.'s interview with the child interview specialist during deliberations. We also conclude Adams's persistent offender sentence does not violate his Sixth Amendment right to a jury.

We affirm Adams's conviction of two counts of first degree rape of a child and the court's decision to impose a life sentence with no possibility of parole under RCW 9.94A.570.

Schindler, ACJ

WE CONCUR:

Dwyer, J.

Ellington, J.